United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-1113

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arbolede, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT EDGAR RESTREPO-BOTERO

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Preliminary Statement

The appellant herein, EDGAR RESTREPO-BOTERO was first arrested on July 17, 1973 in the Taft Hotel and subsequently was charged with possession of 213.5 gm. cocaine hydrocline in Indictment 73 CR 729.

When arrested, the appellant gave his name as Omar Hernandez and was so named in the Indictment. BOTERO failed to appear for arraignment on this indictment. A bench warrant was issued on August 13, 1973. He was rearrested September 8, 1973, bail was increased, appellant met bail and could not be located on date of trial November 19, 1973. BOTERO was rearrested May 21, 1974.

The trial of 73 CR 729 before Honorable Constance Baker Motley was from June 27 to July 2, 1974. He was found guilty and subsequently sentenced September 9, 1974 to a 5 year prison term to be followed by 3 years Special Parole.

Carmen Caban, unindicted co-conspirator in S75 CR 429 was arrested and charged with an A-1

Felony in New York State Courts on July 26, 1973. In March, 1974, before sentencing on the state charge, Carmen Caben began to cooperate with the federal prosecutors. (T 1652).

On May 11, 1974, some 5 days prior to BOTERO'S re-arrest and several months prior to trial on 73 CR 729, the first of the conspiracy indictments connected with this case,74 CR 494, was filed. Indictment 74 CR 494 charged the appellant herein, named OMAR HERNANDEZ, a/k/a Edgar,as well as JOSE ANTONIO CABRERA-SARMIENTO, a/k/a Pepe, ALBERTO BRAVO and GRISELDA BLANCO with conspiracy to import, possess and distribute cocaine. (A 51).

Another indictment, 74 CR 817, specifically not superseding 74 CR 494, was filed August 19, 1974 alleging a conspiracy to import cocaine and marijuana from Colombia to the United States. Its operations were centered in Florida and centered around the activities of William Andreis, Gaston Robinson and Pepe. (A 60). William Andreis had been cooperating with the federal government

since November 1974 (T 1976). Appellant BOTERO is nowhere named in this indictment.

Indictment 74 CR 910, filed September 25, 1974 did not have appellant BOTERO. Nor did Indictment 74 CR 939, filed October 4, 1974 have Edgar Restrepo-BOTERO as a defendant or co-conspirator. This Indictment encompassed the group around the Mono/Mario operations discussed herein - the wiretape/surveillance conspiracy. (A 60).

The surveillance and wiretaps were continuous from January 1 - October 4, 1974 (T 3025).

In November 1974, Indictments 1 and 3 74 CR 494 and 74 CR 910 were consolidated and superseded by 74 CR 1128. The overt acts of this indictment alleged events occuring in both New York and Florida from July 1972 to September 1973. There is no mention of either the Andreis group alleged in Indictment 74 CR 817 or the New York Mono/Mario operation of 74 CR 1128. (A 82).

It was not until April 30, 1975, some 6 months later that superseding Indictment 75 CR 429 was filed amalgamating the above cited Indictments.

Questions Presented

I. Whether the proof at trial established multiple conspiracies creating a prejudicial variance between indictment and proof?

II. Whether the prosecutorial format of charging a single conspiracy where multiple conspiracies existed prejudiced the appellant by allowing the admission of irrelevant evidence and hearsay statements?

III. Whether appellant BOTERO has been subjected to piecemeal prosecution in violation of Double Jeopardy protection of the Fifth Amendment?

STATEMENT OF FACTS

The appellant EDGAR RESTREPO-BOTERO relies for the most part on the joint statement of facts filed by the appellants. The following sets forth additional matter dealing particularly with the role of appellant BOTERO in these proceedings.

The Government's Theory of the Case:

The government's theory of the case, uniting all the defendants was that the trial was that of members of the New York Headquarters of the International Drug Smuggling Organization having its headquarters in Colombia (T 40) with the purpose of "flaunt[ing] the narcotics laws of the United States . . . to satisfy greed for fat and easy money." (T 49)

The objectives of this conspiracy were primarily cocaine distribution and secondarily marijuana distribution (T 12).

The government set forth the outline of the operation of the "New York office staff" and

the Colombian heads of the operation in a neat, tight picture, showing each named participant in a definite, well-defined role. (T 67-73). Those named were the alleged members of the Mario Rodriguez/Mono group with Alberto Bravo (I) as the Colombian source. There was no mention of, or role for the Andreis group, nor of appellant EDGAR RESTREPO-BOTERO.

At the close of the case, the government's theory was basically unaltered. It was argued that the conspiracy was a single large conspiracy involving the shipping of marijuana and cocaine from Colombia to the United States during the time period 1972 through October 1974 (T 7810-11). The defendants "agreed and understood" that they participated in such a single conspiracy based on the 200 taped conversations (T 7847), code language used in these conversations, and on unspecified "other evidence that these people are part of one organization . . . having the particular purpose of distribution of cocaine." (T 7850)

The core of the "single conspiracy" is still the New York group under Mono and Mario (T 7814). Pepe is asserted to be at the highest level of U.S. operations, receiving the cocaine and "filter[ing] it down to wholesalers" (T 7814-5). BOTERO was asserted to be a wholesaler under Mono (T 7814) and his connection to Mario Rodriguez was alleged through a series of business cards, telephone calls to someone named "Arturo Velasquez" and taped phone conversations referring to "Cachete" (T 7897-790).

Evidence of EDGAR RESTREPO-BOTERO'S Relationship to the Conspiracy Charged

(a) Rita Ramos and Carmen Caban's Testimony

Testimony of appellant BOTERO'S drug dealings come from two witnesses, Rita Ramos and Carmen Caban. Ramos testified it was from BOTERO that she first began to purchase cocaine in 1972 (T 261) and that he taught her to cut and sell the cocaine so as to make a profit (T 266).

Ramos knew BOTERO by the names of "Edgar", "El Cachete", "El Sobrino" (T 2701) and never knew him as Omar Hernandez (T 547).

Subsequent to Ramos' cooperation with the New York City Police in September of 1973, Ramos had a conversation with BOTERO in a bar in Queens which although taped (T 376, 379) was never played for the jury, nor were its contents testified to.*

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* It was during this period of time that Ramos arranged for a sale of cocaine to Carmen Caban and her sister Gloria, resulting in their arrest on July 26, 1972 (T 310).

On December 28, 1973, Ramos met with Special Agent Savorio J. Weidl of the Drug Enforcement Agency (DEA) and began cooperating with the federal government (T 478, 481). A few months later, March 6 through March 20, 1974, Ramos had frequent briefing sessions with Agent Weidl about "this case" (T 547).* Ramos could not identify appellants Libardo Gill (T 577) or Fransisco Armedo ("Mono") (T 577).

Carmen Caban's testimony sets forth a series of drug transactions involving BOTERO during the year 1972 through early 1973. The other participants in these deals were the "Mules":

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* Special Agent Weidl also testified at trial - recounting the surveillance of confidential informant Jorge Brana with Ramos. Ramos introduced Brana to persons said to be her cocaine source -- Hernandez Restrepo and Orlando Hurtado, and Alberto El Facci (T 829-33, 839, 961). It was stipulated that Hernandez Restrepo was not Edgar Restrepo-BOTERO (T 852). Nothing occurred or was said during the Ramos/Brana deals concerning BOTERO.

It should also be noted that Special Agent Weidl also debriefed Carmen Caban when she began cooperating with the federal government in March 1974.

Parra, a/k/a Jairo (T 1240, 1254), Montes-Gomez, a/k/a Picharillo (T 1269-70), Miguel (T 1189, 1242, 1254), Callajos (T 1261), Diana (T 1399), Annie Sanjuro, a/k/a Araculi (T 1270-1), Antonio Romero (T 1403), and associates Rita Ramos (T 1277, 1276), Abran (T 1152-3, 1155, 1240), and the Colombian sources Alberto Bravo, Bruno Bravo, Griselda Blanco and Catiri (T 1152-3, 1155, 1254, 1266-7). Phone calls were placed between Catiri in Colombia and BOTERO in New York before and after deliveries of cocaine were made (T 1242, 1254, 1261, 1266-7, 1281). It was BOTERO who paid the "mules" $1,500 for their deliveries (T 1242, 1436-8), and it was with BOTERO that the "mules" stayed while in New York City (T 1242, 1261, 1270).

Caban also testified that she did not know BOTERO by the name Omar Hernandez until after her arrest. At the time of her arrest, she told the police that the drugs belonged to Hernandez Restrepo "so as not to say that they belonged to Edgar." (T 1643).

Although Caban went to Maimi with Pepe during the summer of 1973 (T 1447) she did not testify as to having met Andreis, Gaston Robinson or any knowledge of a Pepe/Andreis "business association" or that BOTERO had any dealings in Miami. She did testify that while in Florida, she and Pepe learned of arrest of Colombian in Texas and that phone calls were made to BOTERO and Griselda Blanco (T 1452).

(b) Surveillance of Abran and Cesar Riveros.

In September 1972, the New York Drug Enforcement Task Force was conducting surveillance on drug dealings by Abran and Cesar Riveros (T 778-784). A surveillance photo taken by the government at the Imperial Bar on Roosevelt Avenue in Queens contains Abran and a person identified as BOTERO (Gov. Ex. 15, T 794). Detective Arthur Drucker testified that the object of the surveillance was Abran and Cesar Riveros (T 794), that the cocaine negotiations did not include BOTERO (T 794), and that he has never seen Abran and

BOTERO together or talk to each other (T 795). Further, he testified that the bar was frequented heavily by Colombians. Detective Drucker could not himself identify BOTERO (T 794).

(c) BOTERO'S Arrest - July 16, 1973.

Other evidence at trial showing BOTERO'S involvement with cocaine came with the testimony and exhibits surrounding the arrest of Jose Hurtado at Los Angeles airport (T 1864) and the subsequent arrest of BOTERO at the Taft Hotel in New York City July 14, 1973 upon his receipt of a dummy package of cocaine from Hurtado (T 1876). The government introduced into evidence the shoes Hurtado used to hide the cocaine as well as photos of him clad only in a jock strap specially constructed to hold cocaine.* By the testimony of surveillance officers, it was re-

* Several counsel objected to these photos as "obscene". (T 1867)

counted that Hurtado contacted BOTERO in New York City by calling a telephone number which was answered by a man identifying himself as Omar Hernandez (T 1902). The government introduced items taken from BOTERO at his arrest - a business card from the Bull & Bear Restaurant, a black address book and a piece of paper (Gov. Ex. 88, 89, 90) (T 1903).

(d) The Florida Deals - Andreis Group.

The Andreis/Pepe deals took place in 1973 through 1974 (T 2023). Andreis stated that one of Pepe's associates was Omar Hernandez (T 2029-30) and that he had met "Omar" in Miami in the presence of Pepe in December 1974. (T 2030). He did not testify as to any conversations or transactions concerning drugs during this meeting. Andreis could not identify the person he met in Florida named Omar Hernandez among the defendants in the courtroom (T 2218).

Pepe's companion in Miami, Lionel Fernandez, the maitre d at the Bull & Bear

Restaurant identified BOTERO as someone he met with Pepe on four occasions in Miami sometime after October 1973 (T 2428). Fernandez recalled that telephone calls were made by Pepe to "Omar, also called Edgar" in New York City (T 2049, 2477). No testimony was given regarding the content of these phone calls. On one occasion Fernandez overheard Pepe and "Omar" discuss stealing cocaine. (T 2437).

(e) The Wiretap and Surveillance of Mario/Mono Group

The third segment of the trial, dealing with the Mono/Mario operation in New York City was recounted to the jury through the playing of 200-odd tapes and testimony of federal officers who conducted surveillance. There was no testimony reporting any observation of BOTERO having any drug dealings or even association with the members of that group. None of these phone conversations had BOTERO as a party.

Of these 200 phone conversations, several referred to person or persons named "Edgar", "Omar"

or "Cachete".

"Edgar" was referred to in conversation on May 12 at 10:12.

Conversation No. 670 on May 23, 1974 - Omar called Mono. It was stipulated that this was not BOTERO.

On June 10 at around noon "Omar" met with others in apartment 10-F, 215 E. 64th Street, where Arturo Gonzalez entered carrying attache case.

Conversation No. 130 on May 7, 1974 at 12:28 p.m. - a phone call between Arturo Gonzalez and Mono. Arturo said that he had spoken with Cacheton, and Mono asked if Cacheton could go to Miami.

Conversation No. 300 on May 13, 1974 at 1:51 p.m. - Alberto Bravo called Mono and they mentioned El Cacheton in the conversation.

Conversation No. 444 - May 15, 1974 at 12:17 p.m. - Arturo Gonzalez called Mono and said that he had told someone to ask about El Cacheton.

Conversation No. 664 on May 22, 1974 at 2:04 p.m. - Carlos called Mono and asked what was

new with Cacheton. Mono told him that he was sick.

Conversation No. 465 on July 7, 1974 at 8:03 - Juan Mesa inquired as to who Guillermo was and was told by Mario that he was a friend of Jorge and they both knew Cacheton.

Conversation No. 174 on August 20, 1974 at 10:21 p.m. - Jorge Hernandez called Mario and asked him if he had a piece of a shirt to send to Jairo and El Cacheton. Mono said he would send it.*

(f) Other Proof.

As assortment of other allegations were made by the government to buffer their theory that BOTERO was part of the drug conspiracy of Mario Rodriguez and Mono:

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* It was the position of counsel at trial that "Cacheton" or "El Cachete" is a common nickname in Colombia. In addition, the evidence showed that Arturo Velasquez may well have used the nickname "Cachete" (infra, p.17) and Conversation No. 441 on July 6, 1974 indicated that Jose Salazar was known by the name "El Cachete".

1. Omar Perez testified that "Edgar" was seen in 1974 at Gamma International, a Colombia to Miami shipping company, sending a television set and radio to Colombia (T 6143). Perez had no discussion or business with BOTERO concerning the importation of drugs from Colombia (T 6180).

2. That BOTERO used the alias of Arturo Velasquez in 1974 and under that name, leased an apartment.* The lease and attachments were introduced into evidence (T 6629, Gov. Ex. 179). The lease had Gamma International as a co-signor on the application and the security was to be returned to Blondes & Brunettes Beauty Salon. The lessor of the apartment did not know Velasquez and did not identify BOTERO (T 6629). A page torn from a telephone book found in Mario Rodriguez's apartment had "in code" the telephone number for Arturo Velasquez listed next to the nickname "Cachete". (T 6425, Gov. Ex. 537).

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* The Bill of Particulars lists Arturo Velasquez as an alleged co-conspirator.

POINT I

THOUGH THE GOVERNMENT CHARGED ONE CONSPIRACY, THE PROOF ESTABLISHED MULTIPLE CONSPIRACIES. THIS VARIANCE BETWEEN INDICTMENT AND PROOF AFFECTED SUBSTANTIAL RIGHTS OF THE APPELLANT.

The government, ignoring the warnings in U.S. v. Sperling, 506 F.2d 1323 (2d Cir. 1974), would like to lull this Court into accepting its theory that the proof in this case establishes a large, single conspiracy* of cocaine sources, importer-suppliers, distributors existing in separate time frames, with no continuous core of actors or modus operandi.

To that end, the government theory is that of a single conspiracy having the modest purpose of "flaunting the narcotics laws of the U.S." and the "particular"(?!!) purpose of cocaine importation from Colombia and distribution in the United States. It attempted to ground the conspiracy

* It cannot be overemphasized that the conspiracy charged had 38 defendants and 410 co-conspirators.

in the New York Mono/Mario enterprises and attaching BOTERO, Pepe and Andreis thereto.

Given the emphasis of the prosecution on the participation of BOTERO in this alleged conspiracy and the convoluted attempts to place him in each of the segments*, this argument is submitted with special emphasis on BOTERO to supplement the Joint Brief on Multiple Conspiracy.

In the case herein, the alleged single conspiracy without effort divides into multiple groups. Not only can one clearly distinguish the BOTERO/Pepe deals from the Andreis group and the Mono/Mario operation in terms of source of cocaine and personnel; but they also follow sequentially with no apparent continual development.**

This Circuit has found single conspiracies in narcotics cases demonstrating the existence of multiple groups where transactions take place

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* See government's argument on summation.

** See the Joint Statement of Facts and Joint Argument on Multiple Conspiracy for more specificity on this point.

between only several of the conspirators. While it is recognized that the essential element of the conspiratorial enterprise is the common agreement, U.S. v. Borelli, 336 F.2d 376, 384 (2d. Cir. 1964), cert. denied 379 U.S. 960 (1965), it has been found necessary to develop standards for infering that common agreement and thereby the existence of a single conspiracy.

As succinctly summed up in U.S. v. Bertolloti, Docket No. 75-1107, Slip Op. 6409, 6418 (2d Cir. Nov. 10, 1975):

> ". . . Despite the existence of multiple groups within an alleged conspiracy, we have considered them as part of one integrated loose-knit combination in instances where there existed 'mutual dependence and assistance' among the spheres, United States v. Tramunti, supra, a common aim or purpose among the participants, United States v. Agueci, supra, or a permissible inference, from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture, U.S. v. Sperling, supra; U.S. v. Bynum, supra. The common thread running through these cases is our treatment of them as general albeit illegal, business ventures. U.S. v. Mallah, supra, at 976."
>
> Slip Op. at 6418

An explication of U.S. v. Tramunti, 513 F.2d 1087 (2d Cir. 1975), U.S. v. Mallah, 503 F.2d 971 (2d Cir. 1974), and U.S. v. Sperling, supra, is instructive and controlling as to whether these multiple groups comprise an "integrated loose-knit combination".

In the companion cases of Sperling, supra, and Mallah, supra, the facts demonstrated two groups of drug dealers, one headed by Pacelli, the other by Sperling, each dealing separately in cocaine or heroin. In Sperling, this Court found a single conspiracy since the facts demonstrated that each organization acted as a supplier and customer of the other, co-existing during the same period of time in New York City. In addition, the government presented the testimony of witnesses common to both spheres of the conspiracy.

In Mallah, this Court focused on the existence of a single conspiracy by the mutual dependence of the Pacelli and Sperling group as indicated by "common direction from core conspirators, commingling of assets, mutual dependence,

common business offices." 503 F.2d at 976.

And in U.S. v. Tramunti, supra, this Court found that the two spheres of narcotics operations, one headed by Inglese and Tramunti and the other by Di Napoli and Pugliese, were not independent competitors: "There was sufficient proof of mutual dependence and assistance to warrant treatment of the two spheres as one general business venture." 513 F.2d at 1106. Four factors were used to make that determination:

1. Movement of personnel freely from one organization to another.

2. Involvement of leadership of one sphere in the other sphere of operation.

3. Intimate knowledge by Pugliese of the details of the Inglese operation.

4. Both organizations made sales to common distributors.

513 F.2d at 1106.

While holding that the fourth factor alone would not prove a single conspiracy:

> ". . . the cumulative effect of all of the above is to tend to demonstrate the existence of a single conspiracy linked together by cooperation, trust and a mutual source of supply."
>
> 513 F.2d at 1106

Another index of the existence of a multiple conspiracy would be whether an appellant, if tried separately for participation in each group or sphere would have a successful double jeopardy argument. See, U.S. v. Papa, Docket No. 75-1208, Slip Op. 2977, 2990 (2d Cir. April 2, 1976); U.S. v. Mallah, supra, at 895. In determining double jeopardy challenges in Mallah this Court considered key factors such as the "principals, the source of their drugs, the manner and places of importation, their distribution points and the center from which they operate", U.S. v. Aviles, 274 F.2d 179, 194 (2d Cir. 1960) quoted in Mallah, 503 F.2d at 983, finding Pacelli's conviction in Pacelli VI to be for the same conspiracy as he had been convicted of in Pacelli I. This Court therefore reversed on double jeopardy grounds.

Moreover, in Papa, supra, this Court found that the two conspiracies which Papa stood at the head of were each "large scale free standing operations", each having a full complement of personnel. Slip Op. 2981. The fact that he supervised each chain did not serve to transform two conspiracies into one. Slip Op. 2990; Kotteakos v. U.S., 328 U.S. 750, 754-55 (1946).

> "Whereas in Mallah the Court found that Pacelli I defendants could not have successfully advanced a multiple conspiracy claim had they been charged together with the Pacelli VI defendants in a single conspiracy indictment, 503 F.2d at 983, such marshalling of the Eastern and Southern District defendants in a single indictment would epitomize the indictment format specifically condemned in U.S. v. Sperling, supra."
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> U.S. v. Papa, Slip Op. at 2990.

Thus, the establishment of an "integrated loose-knit combination" wherein there exists a "division of labor at various functional levels", U.S. v. Agueci, 310 F.2d 817, 826 (2d Cir. 1962), cert. denied 372 U.S. 959 (1962) on a scale large enough to involve several participants performing

similar roles, U.S. v. Bynum, 485 F.2d 490, 495 (2d Cir. 1973) depends on an operation demonstrating some indicia of unifying factors sufficient to infer the existence of "two or more chains connected by a hub of core conspirators". U.S. v. Mallah, supra, 503 F.2d at 984.

By all the standards set forth above, the instant case clearly does not have factors giving rise to an inference of a single conspiracy. None of the criteria which allowed this Court to infer one conspiracy in the face of multiple groups are present.

There can be no "mutual dependence and assistance" between groups of cocaine dealers where one enterprise has ended and another begun with a different cast of characters and in a different location. U.S. v. Papa, supra, Slip Op. at 2989. There is no common direction to the three segments - the Colombian heads of the drug trade differ. Alberto Bravo I, the source of cocaine in Segment I and II, is not the same person as Alberto Bravo II, Andreis'source. Nor is Pepe's presence

in each segment indicia of a "core conspirator" directing or uniting the three groups into one enterprise.* This business relationship of Pepe and Andreis as testified to at trial did not provide a link to BOTERO or the Mono/Mario operations.

An examination of the evidence against BOTERO in the light most favorable to the government, U.S. v. McCarthy, 473 F.2d 300, 302 (2d Cir. 1972) underlines not only the existence of multiple conspiracies but the prejudicial conduct of the government in prosecuting this case as a single conspiracy. With the use of a great deal of speculation and contorting of evidence the government attempted to place BOTERO within each of the groups and thereby bolster the single conspiracy theory.

The only evidence of drug dealing engaged in by BOTERO came from the testimony of Rita Ramos and Carmen Caban. Their testimony provided proof

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* Note the discussion in the Joint Brief on Andreis' distrust of Pepe.

of BOTERO'S independent relationship to Alberto Bravo I rather than involvement in a New York operation with Mono at the head. Communication concerning the arrival of cocaine in New York from Colombia was directly between BOTERO and the Colombian heads, Bravo, Blanco and Catiri. The mules were all paid by BOTERO and stayed with him while in New York. Despite BOTERO'S business relationship with Pepe and sometimes Abran during 1972 through early 1973, he conducted his dealings with Colombia independently of any "New York office staff". Indeed, there wasn't evidence of the existence of or mode of operation of the Mono/ Mario operations until the wiretap and surveillance began in January 1974.

The appearance of BOTERO in a photo taken at the Imperial Bar during surveillance of drug dealings of Arturo Gonzalez and Cesar Riveros in 1972 is not evidence of drug dealings including BOTERO or participation in an on-going single conspiracy as charged in 75 CR 429.

Nor does the testimony of Andreis or Fernandez concerning the presence of "Omar" in Miami with Pepe in Fall of 1973 provide evidence of participation in a drug conspiracy with Pepe and Andreis. Notably, Andreis cannot identify BOTERO nor does he testify as to any discussion of drug trade with "Omar" during that meeting. Fernandez, who does identify BOTERO as someone he met with Pepe in Miami, testifies only to the fact that he met BOTERO, that periodically Pepe called "Omar" in New York City and that once Pepe and BOTERO conversed about stealing cocaine.

Phone calls and meetings, without more, e.g.,evidence that the content concerned drug transactions,cannot link BOTERO to a participation in a drug conspiracy. U.S. v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974), U.S. v. Cimino, 321 F.2d 509 (2d Cir. 1963) cert. denied 375 U.S. 974 (1964).

Moreover, the mere evidence of a discussion about theft of cocaine, without linking that theft as an integral part of the drug chain is merely irrelevant evidence and not evidence of participation in

a narcotics conspiracy. (U.S. v. Bynum, supra, at 498; U.S. v. Bertollotti, supra, at 6422).

Nor does the government succeed in placing BOTERO in the third segment - the Mono/Mario operations. Despite the voluminous number of taped phone conversations and surveillances, there were no phone conversations with BOTERO as a party, nor any observations of BOTERO having any drug dealings or even association with members of that group.

The government posited the theory that several of the phone calls mentioning "El Cachete" or "Cachetan" were references to BOTERO. These fleeting references do not establish BOTERO as a member of the Mono/Mario group, or as one dealing with that group as part of one "integrated loose-knit combination".

First, there was nothing to establish that the "Cachetan" referred to in the phone conversations was BOTERO. The trial was replete with identical nicknames and code names for more than one individual. In fact, the phone conversations included references to "Edgar" and "Omar" which the

government stipulated as not referring to appellant EDGAR RESTREPO-BOTERO.

In addition, the phone conversation demonstrates that Mono knew "Cachetan" but not that he had a "business" relationship with them. In fact the only conversation referring to drugs (if one accepts the government's code language theory), is on August 20, 1974 where it is requested that drugs be sent to "Cachetan". BOTERO, however, is at that time in federal custody.

Nor do the various business cards, telephone numbers and the lease in the name of Arturo Velasquez, even if found by this Court to be tied to BOTERO, provide links transforming multiple groups dealing in cocaine into a single conspiracy.

The evidence, as it pertains to appellant BOTERO, demonstrates multiple conspiracies with his participation in only Segment I. Meetings, and phone calls and association, without evidence of a criminal character do not place him in the expansive, diffuse enterprise charged by the government.

The prejudice suffered by BOTERO need not be tediously rehashed. The Joint Brief elaborates the quantum of evidence of drug deals, violent crimes, the wire taps which served to bury the appellants and deprive them of a fair trial. The government used the conspiracy theory to introduce evidence of transactions having no direct bearing on the appellants. As to appellant BOTERO, the government introduced evidence concerning Hernandez Restrepo, "Edgar" and "Omar", none of whom were appellant BOTERO but which must have confused the jury.

Moreoever, it was not the government which sought to untangle the identity crisis. It was defense counsel, after the evidence was presented, who had to secure stipulations from the government that those persons were not appellant BOTERO.*

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* The government did likewise concerning Bravo I and Bravo II. It was not until after the direct examination of Andreis, wherein he testified as to his source in Medellin, Colombia, Alberto Bravo, that defense counsel elicited a stipulation that this was not the same Alberto Bravo who was BOTERO'S source.

Thus, the single conspiracy format applied by the government without justification to a series of drug transactions comprising independent groupings of cocaine dealers irreparably prejudiced BOTERO.

POINT II

THE PROSECUTORIAL FORMAT OF CHARGING A SINGLE CONSPIRACY WHERE MULTIPLE CONSPIRACIES EXISTED PREJUDICED THE APPELLANT BY ALLOWING THE ADMISSION OF IRRELEVANT EVIDENCE AND HEARSAY STATEMENTS

In Krulewitch v. U.S., 336 U.S. 140 (1949), Mr. Justice Jackson warned that the conspiracy theory rationalized the admission of otherwise inadmissible evidence:

> ". . . the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. . . In other words, a conspiracy is often proved by evidence that is admissible only upon assumption that conspiracy existed."(emphasis added).
>
> 336 U.S. at 453.

The case herein is a prime example of the abuse of the prosecution in admitting item upon item of "evidence" against appellant BOTERO, which without the single conspiracy format would have been ruled out as inadmissible on grounds of irrele-

vancy, lack of connection, and hearsay.*

The government was here able to use BOTERO'S drug dealings as set forth in Segment I as the justification for admission of evidence in Segments II and III which were totally hearsay or irrelevant to the conspiracy in which the facts showed BOTERO was a participant of.

Thus, the government introduced testimony of Andreis and Fernandez alleging BOTERO'S presence in Miami with Pepe. No relevant non-hearsay evidence of BOTERO'S involvement in a drug conspiracy with Andreis was testified to.

The government contended that BOTERO was seen once at Gamma International, which had ties to participants in Segment III, although his presence at Gamma was specifically for a non-drug related purpose. Similarly, the government postulated that BOTERO used the alias of Arturo Velasquez during 1974 and was therefore involved in the Mono/

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* This is in addition to the score of drug transactions already noted in the Joint Brief.

Mario operations. Without at all conceding that BOTERO and Velasquez were the same*, Velasquez's links to the Mario/Mono operations were purely circumstantial - a telephone call and the name listed in a telephone book. No evidence was presented of involvement in drug traffic.

Thus, had the government attempted to use such speculative circumstantial and hearsay evidence against BOTERO at trial on the 3 separate conspiracies demonstrated by the evidence, a judgment of acquittal would have been directed. This Circuit has followed the firm rule that the jury is permitted to consider the hearsay statements and declarations of co-conspirators only after the trial judge determines that the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the non-hearsay evidence. See, United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969); United States

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* Note that there was no prior connection of Velasquez to BOTERO and Velasquez was listed as an unindicted co-conspirator.

v. Calabro, 449 F.2d 885 (2d Cir. 1971); United States v. Cirillo, 499 F.2d 872 (2d Cir. 1974); United States v. Santana, 503 F.2d 710 (2d Cir. 1974).

Therefore, in addition to the prejudice suffered by BOTERO from the introduction of a mass of inflamatory testimony, physical evidence and wiretap conversations unrelated to him, he was dragged into other segments on the basis of evidence purely irrelevant and hearsay as to his involvement in drug conspiracies.

POINT III

THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT THE APPELLANT NOT BE SUBJECT TO PIECEMEAL PROSECUTION

The Double Jeopardy Clause of the Fifth Amendment stands for the fundamental principle that:

> "[A] person shall not be harrassed by successive trials, that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts . . . In short, 'the prohibition is not against being twice punished, but against being twice put in jeopardy.' U.S. v. Ball, 163 U.S. 662, 669."

Abbate v. U.S., 359 U.S. 187, 198-199 (1959) (Brennan, J., concurring). See also, Ashe v. Swenson, 397 U.S. 436 (1970) (Brennan, J., concurring).

This principle of Double Jeopardy has been violated in the case herein. Appellant BOTERO'S prosecution on the conspiracy(s) charged herein was part of a piecemeal prosecution against him. The receipt of cocaine from Hurtado, the basis of

prosecution in Indictment 73 CR 729, was alleged by the government to be in furtherance of the conspiracy charged in Indictment 75 CR 429. The failure of the government to join both offenses has resulted in impermissibly subjecting the appellant to successive prosecution for the same course of conduct.

The Double Jeopardy prohibition is a recognition of the enormous expenditure of human resources required for the accused to defend himself and the imbalance between his resources and that of the government.

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Green v. U.S., 335 U.S. 184, 187-188 (1957). See also, Note, Twice in Jeopardy, 75 Yale L.J. 262, 277-78 (1965).

The Double Jeopardy guarantee similarly applies to a prosecution following a judgment of conviction. See, Ex Parte Lange, 18 Wall. 163, 169; U.S. v. Ball, 163 U.S. 662, 669 (1896).* Trial following a prior conviction subjects the accused to similar expenditure of resources and increases the possibility of increased sentencing if a conviction results from the second conviction.

Double Jeopardy guarantees are not a shield against successive punishment for separate offenses nor a bar to multiple charges at one trial. (See, Abbate, supra, 359 U.S. at 198-199; Ashe v. Swenson, supra, 397 U.S. at 459 (n. 14).) But it must prohibit separate, successive piecemeal prosecutions. Such a prohibition curbs the potential for abuse in a judicial system which allows broad, often unreviewable prosecutorial discretion and "stand[s] as a constitutional barrier against possible tyrany by the overzealous prosecutor". Ashe v.

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* Justice Brennan in his opinion in Abbate, supra, at 149 and Ashe v. Swenson, supra, at 459 specifically noted that his concern for harassment due to successive prosecution applied to instances where the prior judgment was a conviction as well as where it was an acquittal.

Swenson, supra, 397 U.S. at 455.

Justice Brennan forcefully noted that the ability to prosecute an accused successively for the same criminal conduct is a more effective means of harassment than reliance on the trial judge to impose consecutive rather than concurrent sentences, since

> ". . . unless the Fifth Amendment applies, it would be solely within the prosecution's discretion to bring successive prosecutions based on the same acts, thereby requiring the accused to defend himself more than once."

Abbate v. U.S., supra, 359 U.S. at 199.

The ability of the government to multiply the number of offenses by successive prosecution provides the government with the ability to "wear the accused out by a multitude of cases with accumulated trials". Palko v. State of Connecticut, 302 U.S. 319, 328 (1937). As Justice Brennan wrote in Abbate, supra, "[R]epetitive harassment in such a manner goes to the heart of the Fifth Amendment protection". 359 U.S. at 200.

Moreover, basically the Double Jeopardy

Guarantee is premised on "our civilized notion about criminal law -- our respect for a jury verdict and the presumption of innocence, our aversion to needless punishment, our distinction between prosecution and persecution". Note, Twice in Jeopardy, supra, 75 Yale L.J. at 278.

The majority of Supreme Court has not yet applied the Double Jeopardy clause so as to preclude successive prosecutions for the same transaction or criminal conduct. Rather, it has adhered, in name at least, to the "same evidence" test which allows for multiple prosecutions where a single criminal episode involving several victims where a single transaction is divisible into chronologically discrete crimes or where a single criminal act is an offense under different statutes. See, Ashe v. Swenson, 397 U.S. at 451.

> "Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecution for an essentially unitary criminal episode are frightening. And given our tradition of virtually unreviewable prosecutorial discretion

> concerning the initiation and scope of a criminal prosecution, the potentialities for abuse inherent in the 'same evidence' test are simply intolerable."*

397 U.S. at 450.

Justice Brennan's position that the Double Jeopardy clause requires a prohibition on multiple prosecutions of charges arising out of a "single criminal act, occurence, episode or transaction" has not yet been adopted by the majority of the Supreme Court, but is urged in American Law Institute and American Bar Association model codes and has been cited with approval in a number of Second Circuit cases.

Both the ALI Model Penal Code §§1.07 and 1.09 (1962) and the ABA Minimum Standards for Criminal Justice relating to joinder and severance §§1.1 and 1.3 (1965) require that a defendant not

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* In addition, collateral estoppel provides some relief from multiple prosecutions, but only where the first resulted in an acquittal and where the issue in question in the subsequent prosecution was "necessarily determined in favor of the accused" at the former trial. Ashe v. Swenson, supra, at 446.

be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, and provides that any subsequent prosecution based on such a related offense be barred by the former prosecution.

As stated in the ALI commentary, the purpose of these sections is protection against the state bringing successive prosecutions "whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials." Model Penal Code, §1.08, Comment, p. 34 (Tent. Draft No. 5, 1956).

The prohibition against successive prosecutions for the same conduct in multiple trials has been enunciated in this Circuit in U.S. v. Sabella, 272 F.2d 206 (2d Cir. 1959). See also, U.S. v. Cioffi, 487 F.2d 492 (2d Cir. 1973), U.S. v. Mallah, 503 F.2d 971 (2d Cir. 1974). In a

decision noting Mr. Justice Brennan's opinion in Abbate, supra, and Gore v. U.S., 357 U.S. 386 (1958), the Sabella court reversed where defendants were re-tried under a different statute for commission of the same alleged criminal conduct:

> "The Fifth Amendment guarantees that when the government has proceeded to judgment on a certain fact situation, there can be no further prosecution of that fact situation alone . . . He may not again be compelled to endure the ordeal of criminal prosecution and the stigma of conviction. These are the plain and well understood commands of the Fifth Amendment in forbidding double jeopardy. Here there was one sale of narcotics, the government should have but one opportunity to prosecute on that transaction. Although in such a prosecution it may join other charges based on the same fact situation, it may not have a succession of trials seriatim."
>
> 272 F.2d at 212.

In U.S. v. Cioffi, supra, this Court specifically and emphatically warned that:

> ". . .,unless prosecutors take to heart the recommendations for joinder of all offenses arising out of the same criminal episode or transaction, double jeopardy will be a fertile ground for Supreme Court development in the next decade."
>
> 487 F.2d at 497.

In a lengthy footnote, the Court cited Justice Brennan's continued attempts "to hammer away at the Court's reluctance to consider anew what constitutes the 'same offense' for double jeopardy purposes", and his advocacy of adoption of a constitutional requirement of joinder for all charges arising out of a "single criminal act, occurence, episode or transaction". 487 F.2d at 497, n. 5.*

And in United States v. Mallah, supra, although unnecessary to the decision of the case, the Court indicated in a lengthy footnote a strong inclination to reconsider the viability of the "same evidence" test and to reject that test in

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* In Cioffi, the Court also noted the Circuit's earlier decision in U.S. v. Nathan, 476 F.2d 456 (2d Cir. 1973) wherein it was held that there was no constitutional requirement that multiple violations of the narcotics law must be tried together. 476 F.2d at 459. Thus, while stating that it "may frequently be the preferable practice" to prosecute at one trial all offenses arising from a single transaction, citing U.S. v. Jones, 334 F.2d 809, 811 (7th Cir. 1964) cert. denied 379 U.S. 993 (1965); the Circuit in Nathan did not consider the necessity of a "single transaction" test to preserve double jeopardy protections. Moreover, the decision was rendered without consideration of Sabella and failed to consider whether the two charged offenses were part of a single criminal episode or transaction.

favor of Brennan's formulation. 503 F.2d at 985, n. 7.

In addition, several state courts have adopted the same transaction standard, see, e.g. State v. Brown, 261 Ore. 442,497 P.2d 1191 (1972); Commonwealth v. Campana, 452 Pa. 233,304 A.2d 432 (1973); People v. White, 390 Mich. 245, 212 N.W. 222 (1973), and at least one state has legislated such a standard, see reference in People v. Golson, 32 Ill.2d 398, 207 N.E.2d 68 (1965).

This joinder at trial of all charges against a defendant growing out of a "single criminal act, occurence, episode or transaction" is essential for the Double Jeopardy clause to retain vitality, and for enforcement of:

> ". . . the ancient prohibition against vexatious multiple prosecutions . . . [and as a response to the] increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurence best promotes justice, economy, and convenience."

Ashe v. Swenson, supra, 397 U.S. at 454.

The remaining essential consideration is the applicability of the "same transaction or occurence" test to the case at bar. The appellant Edgar Restrepo Botero was tried June 27 to July 2, 1974 on the substantive charge of possession of cocaine, Indictment 73 CR 729.* This was subsequent to indictment in 74 CR 494, filed May 11, 1974 on charges of conspiracy to possess, distribute and import cocaine and marijuana from Colombia to the U.S. and after both Carmen Caban and Rita Ramos began cooperating with the federal government.

The earlier trial for possession of cocaine, in Indictment 73 CR 729, resulting in a sentence of 5 years imprisonment plus 3 years Special Parole, was based on BOTERO'S receipt of cocaine from Jose Hurtado in the Taft Hotel on July 16, 1973. Testimony by government agents, as to the arrest of Jose Hurtado at the Los Angeles airport, and subsequent surveillance of and recording

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* Appellant RESTREPO-BOTERO was indicted under the name OMAR HERNANDEZ in 73 CR 729. Similarly, indictment in 74 CR 494 was as OMAR HERNANDEZ.

of the meeting of Hurtado with BOTERO was admitted at trial over objection of counsel on double jeopardy grounds. (T 1860)

There can be no question that, by the government's own theory of the case, this sale was part of one criminal occurence or transaction - part of BOTERO'S participation in the conspiracy. It was introduced by the government as evidence of the conspiracy and as one of the overt acts in furtherance thereof. The government, at the time of his trial on the substantive charge, knew of his involvement in other drug dealings. Rita Ramos and Carmen Caban had already been interviewed by the federal government and Indictment 74 CR 494, the first conspiracy indictment, had already been filed.

Thus, it cannot be said this case falls into the limited category of exceptions to the "same transaction" requirement - that the government had no knowledge of the offense charged in the second indictment at the time of trial on the first. (Ashe v. Swenson, supra, at 453) - at

least as to the conspiracy set forth in Segment I.

As discussed in Point I, supra, BOTERO'S involvement in a drug conspiracy is limited to that as was charged in Indictment 74 CR 494. The government knew of that offense prior to BOTERO'S trial and should have joined the substantive and conspiracy charges at one trial. The failure of the government to so join resulted in a second trial for this appellant which encompassed the same conduct as the first and an impermissible piecemeal prosecution.

BOTERO has suffered two convictions after trial, the second resulting in a sentence of 15 years imprisonment and 5 year Special Parole. The government has been able to abuse its prosecutorial discretion so as to subject the appellant to two trials, two attempts to defend himself over a lengthy period of time, involving several attorneys, necessary use of interpreters and appeal on both cases. This is the type of multiple prosecution

prohibited by the Double Jeopardy clause.

To allow the conspiracy prosecution to withstand attack on Double Jeopardy grounds is to rob that constitutional guarantee of its vitality.

POINT IV

AN EVIDENTIARY HEARING SHOULD BE HELD TO DETERMINE THE GOVERNMENT'S KNOWLEDGE OF THE CONSPIRACY AS CHARGED IN 75 CR 429 AT THE TIME OF TRIAL ON INDICTMENT 73 CR 729

While it is abundantly clear that the government had knowledge of the conspiracy set forth in "Segment I" at the time of the trial on the substantive count, there may be question as to knowledge of all the matters comprising the conspiracy as perceived by the government in 75 CR 429.* Moreover, it would appear that the government had knowledge of Fernandez and Andreis activities at the time of the first BOTERO trial, since Indictment 74 CR 817 comprising the Andreis-Florida based conspiracy was filed but a month and a half after trial on 73 CR 729. In addition,

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* Placing the argument in this context is not meant as a concession to the government concept of these acts as comprising a single conspiracy. Appellant BOTERO'S participation in a cocaine conspiracy is limited to the acts encompassed in Segment I and it is primarily with that understanding that the argument herein is made. However, it is not in fact precluded that the government had knowledge of all segments of the conspiracy charged at the time of trial on 73 CR 729.

the wiretaps which comprised the evidence of the conspiracy in the third segment had been in operation six months at the time of BOTERO'S first trial and indictment in 74 CR 494.

Thus, it can be presumed either that the government had full knowledge of the scope of the conspiracy charged in 74 CR 424 at the time of the trial or that the government's position was that BOTERO'S criminal activities were contained within the parameters of 74 CR 494. An evidentiary hearing should be held on remand to determine the government's knowledge at the time of the first trial and position as to the scope of BOTERO'S criminal activities. In either event, the government was compelled by Double Jeopardy requirements to have joined the charges in June 1974.

Thus the conviction herein should be reversed and the charges dismissed or the Court should reverse and remand this case for an evidentiary hearing to determine whether the failure to join the substantive and conspiracy charges violated

Double Jeopardy requirements.

POINT V

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELIATE PROCEDURE, APPELLANT BOTERO ADOPTS ALL RELEVANT POINTS RAISED BY THE CO-APPELIANTS.

Conclusion

For all of the above reasons, the judgment of conviction of EDGAR RESTREPO-BOTERO should be REVERSED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Second Circuit

United States of America,
Plaintiff-Appellee,
against

Francisco Adriano Armedo-Jarmiento, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, Edgar Restrepo-Botero, aka Omar Hernandez, aka el Sobrino, aka Edgar, Leon Velez, Jorge Gonzalez, aka Jorge Arbolede, Libardo Gill, aka Ramiro Estrada, Ruben Dario Roldan, Carmen Gill, aka Carmen Estrada-Restrepo, aka Carmen Mazo, William Rodriguez-Parra, aka Jairo, Olegario Montes-Gomez,
Defendants-Appellants.

On Appeal From the United States District Court
For the Southern District of New York.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, Apt. 1, New York, New York
That on June 18, 1976, he served two copies of the brief

on United States Attorney for the Southern District of N.Y.
Federal Plaza
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan Delgado

Sworn to before me this
18th day of June, 1976

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977